prevented from completing. On appeal, it was held that the proper measure of damages for the builder was the actual value of the work and materials, the court considering it immaterial whether the builder, had he been allowed to complete, would have made a profit (or loss). In delivering the judgment of their Lordships of the Privy Council, Lord Dalvey said at page 453: "Their Lordships also agree ... as to the proper measure of damages or (more accurately) as to the right of the respondent (builder) to treat the contract as at an end and sue for work and labour done instead of suing for damages for breach of the contract."

The judgment for the contractor is therefore varied by reducing the sum of $14,877 awarded by the $6,500 given for loss of profits.

On a question of costs, both parties have contributed to the confusion in the High Court and the proper order seems to us to be that the order of costs in the High Court shall stand but that each party bears his own cost at the appeal. We so order.

Order accordingly.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Yong & Co.*

KENDERAAN BAS MARA v. YEW BON TEW & ANOR.

[F.C. (Raja Azlan Shah C.J. (Malaya), Chang Min Tat & Syed Othman F.JJ.) November 27, 1979]

[Kuala Lumpur — Federal Court Civil Appeal No. 93 of 1977]

Practice and Procedure — Limitation — Action barred by limitation — Time enlarged by amending statute after action was barred — Whether statute retroactive in its application — Public Authorities Protection Act, 1948 — Public Authorities Protection (Amendment) Act, 1974.

Interpretation — Statutes — Whether retroactive — Whether affecting accrued rights — Public Authorities Protection (Amendment) Act, 1974 — Interpretation Act, 1967, s. 30(1)(b).

In this case the respondents in March 1975 brought an action for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972. Section 2(a) of the Public Authorities Protection Act, 1948 provided that action shall not lie or be instituted unless it is commenced within twelve months next after the act complained of. With effect from June 1974, this provision was amended to substitute "thirty-six months" for the "twelve months'. The question was whether the amending act had retroactive effect so as to enable the respondents to bring their action.

Held: the time for the claim in this case was not enlarged by the amending Act. The Act was not retroactive in operation and had no application to a cause of action which was barred before the Act came into operation.

Cases referred to:-

(1) *The Ydun* [1899] P. 236, C.A.
(2) *Maxwell* v. *Murphy* (1957) 96 C.L.R. 261.
(3) *Rex* v. *Chandra Dharma* [1905] 2 K.B. 335.
(4) *Hamilton Gell* v. *White* [1922] 2 K.B. 422.
(5) *Director of Public Works* v. *Ho Po Sang* [1961] 2 All E.R. 721.
(6) *Free Lanka Insurance Co. Ltd.* v. *Ranasinghe* [1964] 1 All E.R. 457.
(7) *J.S. Drinkhall* v. *Nam Hue Motor Hiring* [1955] M.L.J. 119.
(8) *Raman Kurup* v. *Chappan Nair* A.I.R. 1918 Mad. 86.
(9) *Appasami Odayar* v. *Subramanya Odayar* (1888) L.R. 15 I.A. 167.

FEDERAL COURT.

Zainur Zakaria for the appellants.

K.C. Cheah for the respondents.

Cur. Adv. Vult.

Raja Azlan Shah C.J. (Malaya) (delivering the judgment of the Court): Paragraph (a) of section 2 of the Public Authorities Protection Act, 1948 which provided that action shall not lie or be instituted "unless it is commenced within twelve months next after the act complained of," was amended with effect from June 1974 by section 2 of the Public Authorities Protection (Amendment) Act, 1974 (Act A252) by the deletion of the words "twelve months" wherever appearing in paragraph (a) of section 2 and substituting therefor the words "thirty-six months".

In March 1975 the respondents brought an action for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972.

The question for decision in this appeal is whether the claim which was commenced after the expiry of the twelve months for bringing the action and therefore barred could be revived by the extended period of thirty-six months in the Act. The learned judge expressed a view to which we are not prepared to subscribe. He answered the question in the affirmative. It is necessary to quote *in extenso* his reasoning:

"But the writ is issued after amendment when the period of limitation has been increased from twelve to thirty-six months. The writ is filed within thirty-six months from date of accident. Since the amending Act is purely procedural and therefore retrospective, the limitation law applicable when the writ was issued on March 20, 1975, is the amended Public Authorities Protection Act, and since the period of thirty-six months has not lapsed from the date of accident, I hold that the claim is not time-barred."

The pertinent question for determination is the nature of Act A252 — does it affect rights or procedure. An act which makes alteration in procedure only is retrospective: see *The Ydun.*[1]

In our view there are no cases upon which differences of opinion may more readily be entertained, or which are more embarrassing to dispose of, than the cases where the court has to decide whether or not an amending statute affects procedure and consequently will operate retrospectively or affects substantive rights and therefore in the absence of a clear contrary intention, should not be read as acting retrospectively. The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight must be considered procedural and vice versa.

The Ydun, supra, was quoted to support the argument that Act A252 is procedural. In our opinion that case proceeded on the basis that it was one of procedure only. On the date of issue of the writ (November 14, 1898) the law in force was the Public Authorities Protection Act, 1893 (effective date January

1, 1894) which provided that action must commence by March 1894 which was the date within 6 months next after the act complained of. As the Act dealt with procedure only and therefore had retrospective effect, it applied to all actions commenced after the passing of the procedural statute to enforce rights, whether those rights arose before or after the passing of the statute. Since the action was commenced more than 6 months after the date of the act complained of, i.e., September 13, 1893, it was barred. In our opinion the Act dealt only with the mode in which a right of action for damages already existing should be asserted against the public authority. That seems to be in accord with the common law presumption that a procedural amendment is *prima facie* retrospective. The Act did not affect a vested right adversely. In the case of the latter, there is authority to suggest that the general principle is against retrospectivity.

It seems to us that the Australian case of *Maxwell* v. *Murphy*[2] affords a close analogy. That case dealt with the Australian statutory provisions equivalent to sections 7 and 8 of our Civil Law Act, 1956 (Act 67) on fatal accidents and survival of causes of action. The Compensation to Relatives Act, 1897-1946 (N.S.W.) provided that every action under the Act should be commenced within twelve months of the death of the deceased person. Section 2(a) of the Compensation to Relatives (Amendment) Act, 1953 amended the principal Act as from December 16, 1953 by providing that the words 'twelve months' be omitted and the words 'six years' inserted. On November 30, 1954, the plaintiff brought an action in respect of the death of her husband on March 19, 1951. The substantive right in that case was the right to bring an action within twelve months. On the expiry of that time, the right to bring the action lapsed and as a result there remained no substantive right. Consequently it was held that the amending statute did not apply to actions which prior to the amendment were statute-barred. It can thus be seen that an Act which seemingly could otherwise be described as procedural and therefore have retrospective effect will not be so regarded if to do so would have the effect of depriving a party to a cause of his right of action. Williams J. put it admirably at pages 277-278:

"Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a *prima facie* retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural. Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights."

We are satisfied that Act A252 is not truly procedural but affects vested rights. We say this because we are of the opinion that the Act is an amendment of a provision which operates to extirpate a liability and not merely to deny the procedure for the enforcement of a liability which nevertheless continues to subsist. Where as here a statute affecting procedure also affects vested rights adversely, it is to be construed as prospective. The case of *Rex* v. *Chandra Dharma*,[3] which was relied upon by the learned judge, is to the same effect. In that case the prosecution had been commenced before the first time-bar had expired. But "if the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view it would not have enabled a prosecution to be maintained even within six months from the offence." (*per* Channell J. at page 339).

The matter does not end there. As the case must now be judged in prospect and not in retrospect, we must have regard to the trite maxim "*omnis nova constitutio futuris forman imponere debet non praeteritis*", that unless it is so expressed in the new law, a vested right is not taken away. We see nothing in the language of Act A252 to prevent its application. In any event the maxim is spelt out in the provisions of section 30(1)(b) of the Interpretation Act, 1967 which is as follows:

"The repeal of a written law in whole or in part shall not '(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law'."

In *Hamilton Gell* v. *White*[4] the Court of Appeal was concerned with an analogous problem under the language of section 38 of the U.K. Interpretation Act, 1889. We are well content to quote the language used by Atkin L.J. at page 431 in that case:

"It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has 'acquired a right,' which would 'accrue' when he has quitted his holding, to receive compensation."

A passage from the speech of Lord Morris of Borth-y-Gest in the Privy Council Appeal from Hongkong in *Director of Public Works* v. *Ho Po Sang*[5] in considering an analogous section in the Interpretation Ordinance of Hongkong is to the same effect (page 731):

"It may be... that... a right has been given but that, in respect to it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given."

That passage was adopted and applied by Lord Evershed in a Privy Council Appeal from Ceylon in the case of *Free Lanka Insurance Co. Ltd.* v. *Ranasinghe*.[6] The material facts are as follows. The respondent was injured while driving a motor car which was in collision with a lorry. The owner of the lorry was insured against third-party risks with the appel-

lants. Section 133 of the Ceylon Motor Car Ordinance of 1938 imposed liability on insurers directly towards injured persons. In March 1950 the respondent commenced action against the owner of the lorry. He also gave the appellants notice of the action as required under the Ordinance. In September 1951 he was awarded damages which were increased on appeal in May 1956. In January 1957 he obtained leave to levy execution. In September 1957 he commenced action against the appellants and obtained judgment. Shortly before the September 1951 judgment the Ordinance of 1938 was repealed and replaced by the Ceylon Motor-Traffic Act, 1951 which contained no transitional provisions designed to preserve rights or claims under the Ordinance of 1938, but section 6(3)(b) of the Ceylon Interpretation Ordinance of 1900 which is *in pari materia* to section 30(1)(b) of our Interpretation Act, 1967, preserved accrued rights. The appellants contended that the respondent could claim only by virtue of the statute, and, since the Ordinance of 1938 had been repealed, could found his claim only on the Act of 1951, which Act could not, on a fair construction of section 6(3)(b), cover it. It was held that by serving on the appellants of the notice of his claim, the respondent had on the date of the repeal "acquired a right" against the appellants within the meaning of section 6(3)(b) of the Interpretation Ordinance, although that right might fairly be called inchoate or contingent; and therefore the respondent's right was not affected by the repeal of the Ordinance of 1938.

We referred to those cases merely to illustrate how courts in different jurisdictions, with similar legislative provisions on the point, have approached problems of interpretation. The criteria adopted in those cases in the process of determining "accrued right" seem to be this. It must depend on the happening of an event which is specified in the statute. Now, section 2(a) of the Public Authorities Protection Act, 1948 enacted that action must commence within twelve months. That section was designed to govern the rights of persons desirous of asserting claims against public bodies or persons performing public duties, and it controlled also the rights of the public bodies or persons to the limited protection which it conferred upon them. Prospective plaintiffs and prospective defendants were alike bound. There can be no distinction in principle between a right given by law to commence an action and a defence given by law which bars an action. In respect of causes of action already existing before the operation of Act A252, therefore, both prospective plaintiffs and prospective defendants possessed accrued rights on the happening of the necessary event as specified in the old Act. The necessary event that had happened in the present case is this. On the failure of the respondents to commence action within the specified period the appellants had acquired an "accrued right" which was designed to give them immunity for acts done in the discharge of their public duties. That right was well preserved by the Interpretation Act, 1967.

The matter therefore resolves itself on the application of the law at the time the writ was issued. That that is the principle applicable in the instant appeal is well illustrated by the case of *J.S. Drinkhall* v. *Nam Hue Motor Hiring*[7] which was rightly referred to by the learned judge, but which he had found difficulty in applying. Unless the contrary is provided for, the law of limitation applicable to the suit is the law in force at the date when such suit was instituted, in the instant case, Act A252. But this principle is subject to the condition that the rights sought to be enforced have not already been barred under the previous law: see *Raman Kurup* v. *Chappan Nair.*[8] "A claim barred at the time when the writ is issued is not revived by a subsequent amendment of the law." (see *J.S. Drinkhall* v. *Nam Hue Motor Hiring, supra; Appasami Odayar* v. *Subramanya Odayar*[9]).

It therefore seems to us that in the circumstances of this case, the time for the claim was not enlarged by Act A252. The Act is not retroactive in operation, and has no application to a cause of action which was barred before the Act came into operation.

We would allow the appeal with costs here and below.

Appeal allowed.

Solicitors: *Rithaudeen & Aziz; K.C. Cheah & Co.*

CHAN KUM LOONG v. HII SUI ENG

[F.C. (Chang Min Tat F.J., Salleh Abas F.J. & Charles Ho J.) September 4 & December 6, 1979]

[Kuching — Federal Court Civil Appeal No. 110 of 1979]

Landlord and Tenant — Transfer of tenancy — Rent Controlled premises — Sarawak Rent Control Ordinance (Cap. 86), s. 15.

Practice and Procedure — Preliminary hearing on question of facts — Undesirable — Duty of counsel to court.

In this case the appellant was originally a sub-tenant of the premises. The respondent had agreed to accept the respondent as a tenant at an increased rental and subsequently there were negotiations for an agreement of lease. The respondent however claimed possession of the premises on the ground that the appellant was a trespasser. There had been an earlier action, where preliminary points were raised as to whether the respondent had consented to the subletting of the premises to the appellant and as to whether the appellant had accepted the respondent as chief tenant of the premises. The trial judge answered the first question in the affirmative and the second in the negative. In the second action the prayers and reliefs sought were the same. The learned trial judge gave judgment for the respondent. The appellants appealed.

Held: (1) once a tenant had entered on premises with the approval of the landlord, express or tacit, as for example by waiver from circumstances such as acceptance of rent after knowledge of subletting or assignment, then he cannot be dispossessed of the premises except in any of the circumstances set out in section 15 of the Rent Control Ordinance;

(2) on the facts in this case the respondent had consented to the appellant taking over the tenancy of the premises and therefore she was not entitled to retract and recover possession of the premises;

(3) it is undesirable to have a trial of preliminary issues of fact and counsel owe a plain duty to the court for it to function expeditiously, economically and satisfactorily.

Cases referred to:-

(1) *Tilling* v. *Whiteman* [1979] 2 W.L.R. 401.

(2) *Rajenback* v. *Mamon* [1955] 2 W.L.R. 21.

(3) *West Layton* v. *Ford* [1979] 3 W.L.R. 14 C.A.